Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL,
CLERK

No. 86-108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

GARY HILTON, Superintendent,
New Jersey State Prison, Trenton, New Jersey
and W. CARY EDWARDS, Attorney General
of New Jersey,

Petitioners,

-vs.-

DANA BRAUNSKILL,

Respondent.

On Writ of Certiorari To The United States Court of Appeals For The Third Circuit

JOINT APPENDIX

W. CARY EDWARDS
Attorney General of New Jersey

BY: ALLAN J. NODES
Deputy Attorney General
Division of Criminal Justice

Richard J. Hughes
Justice Complex
Trenton, New Jersey 08625
(609) 292-9086
Counsel for Petitioners

ALFRED A. SLOCUM
Public Defender of New Jersey

BY: MARK H. FRIEDMAN
Assistant Deputy
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20 Evergreen Place
East Orange, New Jersey 07018
(202) 266-1800
Counsel for Respondents

PETITION FOR CERTIORARI FILED JULY 24, 1986
PETITION FOR CERTIORARI GRANTED OCTOBER 14, 1986

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Superior Court of New Jersey, Law Division

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January 26, 27, 28, 29 and 30, 1981—Trial held and verdict of guilty returned in *State v. Dana Braunskill.*

March 26, 1981—Motion for a new trial heard and denied in *State v. Dana Braunskill.* Sentence imposed and judgment of conviction entered in *State v. Dana Braunskill.*

Superior Court of New Jersey, Appellate Division

May 11, 1981—Notice of Appeal filed in *State v. Dana Braunskill.*

December 14, 1982—Affirmance of conviction in *State v. Dana Braunskill.*

Supreme Court of New Jersey

March 1, 1983—Certification denied in *State v. Dana Braunskill.*

United States District Court for the District of New Jersey

April 26, 1985—Petition for *habeas corpus* filed in *Dana Braunskill v. Gary Hilton, et al.*

May 28, 1985—Answer to petition filed in *Dana Braunskill v. Gary Hilton, et al.*

February 27, 1986—Petition for *habeas corpus* granted in *Dana Braunskill v. Gary Hilton, et al.*

March 26, 1986—Motion for stay of order granting *habeas corpus* pending appeal heard and denied.

United States Court of Appeals for the Third Circuit

March 20, 1986—Notice of Appeal filed in *Dana Braunskill v. Gary Hilton, et al.*

May 16, 1986—Motion for stay of the district court order granting *habeas corpus* pending appeal filed in *Braunskill v. Gary Hilton, et al.*

May 27, 1986—Motion for stay of the district court order denied in *Braunskill v. Gary Hilton, et al.*

October 27, 1986—Argument on the merits of the district court order granting *habeas corpus* in *Dana v. Braunskill v. Gary Hilton, et al.*

Supreme Court of United States

October 14, 1986—Petition for *certiorari* granted in *Gary Hilton, et al. v. Braunskill*

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 85-2008

DANA BRAUNSKILL,

Petitioner,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and IRWIN I. KIMMELMAN, Attorney General of New Jersey.,

Respondents.

ORDER

For the reasons set forth in this court's opinion filed this date;

It is on this 27th day of February, 1986;

ORDERED that the petition for writ of habeas corpus is hereby granted; and

IT IS FURTHER ORDERED that the state has a reasonable time in which to retry petitioner and that a writ of habeas corpus shall unless within 30 days the State of New Jersey shall afford petitioner a new trial.

/s/HAROLD A. ACKERMAN
HAROLD A. ACKERMAN
U.S.D.J.

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
BY: RAYMOND S. GURAK
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-2008

DANA BRAUNSKILL,

Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,

Movant-Appellants.

STATE OF NEW JERSEY:
SS
COUNTY OF MERCER:

CIVIL ACTION

NOTICE OF APPEAL

Notice is hereby given that W. Carey Edwards, Attorney General of the State of New Jersey, et al., respondents

above, hereby appeal to the United States Court of Appeals for the Third Circuit from the Order that a Writ of Habeas Corpus shall issue in this action 30 days from such Order which was entered on the 27th day of February, 1986.

Respectfully submitted,

W. CARY EDWARDS
Attorney General of New Jersey
Attorney for Movant-Appellant

BY: /s/RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: March 20, 1986

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR RESPONDENTS
BY: RAYMOND S. GURAK
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
CIVIL NO. 85-2008

DANA BRAUNSKILL,

Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,

Movant-Appellants.

PLEASE TAKE NOTICE that the undersigned will move, on short notice, before the Honorable Harold A. Ackerman, U.S.D.J., in the United States Courthouse Newark, New Jersey, on the 26th day of March, 1986 at 3:30 p.m. or as soon thereafter as counsel can be heard, for an Order: staying entry of the Order of February 27, 1986 that a Writ of Habeas Corpus shall issue 30 days from that date, pending determination of this matter by the United States Court of Appeals for the Third Circuit. Reliance will be placed on the accompanying affidavit in support of this motion.

BEST AVAILABLE COPY

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANT

BY: /s/ RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: March 21, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 85-2008
TRANSCRIPT OF PROCEEDINGS

DANA BRAUNSKILL,

Plaintiff,

vs.

GARY HILTON, Warden of the State of New Jersey,

Defendant.

Newark, New Jersey
March 26, 1986

BEFORE:

THE HONORABLE HAROLD A. ACKERMAN, U.S.D.J.

Appearances:

JOHN F. MC MAHON, Federal Public Defender,
BY: JACQUELINE TURNER,
Assistant Federal Public Defender,
For the Plaintiff.

W. CARY EDWARDS, Attorney General of New Jersey
BY: RAYMOND S. GURAK,
Deputy Attorney General of New Jersey
For the Defendant.

[Tr. p. 2]

THE COURT: May I have the appearances, please?

MR. GURAK: Raymond S. Gurak, Deputy Attorney General for New Jersey.

MS. TURNER: Jacqueline Turner, Assistant Federal Public Defender, for defendant David Rothstein.

THE COURT: Mr. Gurak, you're here today for what?

MR. GURAK: To seek a motion for a stay of your order for enlargement of petitioner Dana Braunskill.

THE COURT: On what ground?

MR GURAK: That's the question, your Honor.

THE COURT: That's the question I'm asking.

MR. GURAK: And the answer is for the special phases of likelihood of success on the merits.

THE COURT: That's not a reason.

MR. GURAK: It's not a reason. It is not a cognizable reason under Carter.

THE COURT: No. Under Carter the only reason is the possibly of flight.

MR. GURAK: The possibility of flight would be substantiated in this case also, your Honor.

THE COURT: Well, substantiate it.

MR. GURAK: Because this petitioner has a long prior record. And we feel that it is quite likely that he would ???? the jurisdiction given his less than though prior record and he would be cognizant of the fact that if our appeal was successful [Tr. p. 3] he would be compelled to serve the remainder of his term as well.

Your Honor looks perplexed.

THE COURT: I'm asking for some substantiation of that. Certainly there was nothing in your papers to even remotely indicate that.

MR. GURAK: Well, my papers, your Honor, cited the cases that dealt with the four factors that could possibly

be used to substantiate special reasons for staying an enlargement order.

THE COURT: Have you read the Court of Appeals recent decision in the Carter case?

MR. GURAK: Yes, I have. It is our office's position that notwithstanding that opinion—

THE COURT: Notwithstanding that opinion?

MR. GURAK: Yes.

THE COURT: What do you mean, "notwithstanding"? You mean I should ignore that opinion?

MR. GURAK: No, no. We feel that that opinion dealt with a specific factual instance wherein the State attempted to argue that stay would be granted in that case on the ground of dangerousness. And we feel that the Court in that decision did not preclude other factors from substantiating the special reason sufficient to grant the stay.

THE COURT: Show me where in that opinion that can be [Tr. p. 4] found.

MR. GURAK: I will attempt to do so. I have a Xerox copy. And I don't have page numbers on it, but under Subsection (b) of the opinion, on the right-hand side of the page just above Roman Numeral 2, there is one full paragraph. And it says, quote, It is rather that we must interpret Rule 23(d) to be consistent with federalism and comity concerned and these concerns dictate that at least in this case. The special reason presented; i.e., dangerness, is one that is particularly within the authority of the State to recognize and act upon.

THE COURT: May I read what Judge Garth said to us, which I think is more pertinent on behalf of the Third Circuit.

"Our holding that a federal court in viewing the release of a State habeas primmer who has prevailed on his con-

stitutional claim should consider only those factors which bear on guaranteeing the future presence of the petitioner does not leave the statement without recourse."

Now, the State in that case, as I read it, was told by the Court of Appeals that if it considered, as it did, Mr. Carter to be dangerous, it could go to the state courts.

I, of course, am empowered to enlarge the time if I find that there is some doubt as to Mr. Braunskill's future presence. The only point I wanted to make to you at this time is in your papers there was no indication whatsoever as to that ground. Is that correct? [Tr. p. 5]

MR. GURAK: As to the ground of dangerousness?

THE COURT: As to the ground that he might not be around if there was a reversal by the Third Circuit.

MR. GURAK: Right. That's true. There was no factual argument in our papers. We solely cited the case law dealing with the four factors and you have that.

THE COURT: How many more years does he have to go or have to serve, to be more precise?

MR. GURAK: He has approximately about four years to go. But he is scheduled for a parole date hearing in August.

THE COURT: In August?

MR. GURAK: In August, yes.

THE COURT: Now, you say that you feel that the fact that he has this time to serve and he has a lengthy criminal record—would you enlarge upon that theme? Tell me about his record.

MR. GURAK: I would have to refer to my papers.

THE COURT: You go right ahead, sir.

MR. GURAK: I will review this briefly; his adult history.

THE COURT: Go right ahead, sir.

MR. GURAK: In 1979 received a DP for invading privacy as a peeping Tom.

THE COURT: "DP" is disorderly persons?

MR. GURAK: That's correct.

THE COURT: As a peeping Tom?

MR. GURAK: Peeping Tom. [Tr. p. 6]

THE COURT: What was the sentence imposed by the Court and what was that Court, if I may?

MR. GURAK: That was a 90-day sentence to the Essex County Jail. Well, that's his prior adult record.

THE COURT: You consider that a lengthy criminal record?

MR. GURAK: Well, he has a lengthy juvenile record as well. And juvenile records can be considered to some extent in deciding whether or not a particular defendant may or may not flee a jurisdiction.

THE COURT: How old is this gentleman?

MS. TURNER: I'm not sure. I believe he's around 30. Late 20s, early 30s.

THE COURT: May I assume whatever record he amassed—I'll question you about it in a moment—was approximately at least 16 years ago? Would that be a fair assumption on this Court's part?

MR. GURAK: That would be, your Honor.

THE COURT: You want to tell me about his juvenile record now that we have carefully examined his adult record and found a 90-day sentence for being a peeping Tom, which is hardly a lengthy criminal regard by any reasonable standard.

MR. GURAK: I will admit to that, your Honor.

In 1976 he was charged with robbery. [Tr. p. 7]

THE COURT: He was charged with robbery?

MR. GURAK: Charged with robbery. There was a remand to Overbrook Hospital for examination.

THE COURT: To what?

MR. GURAK: Overbrook Hospital.

THE COURT: That's a psychiatric hospital?

MR. GURAK: Yes, it is.

THE COURT: What happened to that case?

MR. GURAK: As I look at it now, that was dismissed as well.

THE COURT: What else?

MR. GURAK: I'm still hunting, your Honor.

The others just—there was two with fines and others were dismissed as well.

THE COURT: Mr. Gurak, what lengthy criminal record does this man have?

MR. GURAK: I would have to say I was in error by making that statement, your Honor. I did look at that prementence report rather quickly without—and I apologize to the Court for that.

At this point in time I feel that the only thing the State would be able to argue would be that the facts of this particular case substantiate that this particular petitioner has at this time committed a very serious crime. On that [Tr. p. 8] basis, his dangerousness is established and we fell he has made a substantial move from his minor prior record to that of a serious offender in the state of New Jersey. And on that basis we feel that there is a reasonable

likelihood that he would not show up for the case he would have to in the future proceeding.

THE COURT: What is your name?

MS. TURNER: Jacqueline Turner, your Honor.

THE COURT: Good morning.

MS. TURNER: Basically, your Honor, what we have here is a defendant who has been held on an unconstitutional conviction for the last five years.

There's a—the question is: Did Mr. Braunskill attack this woman? That has always been the question central you. And your Honor ruled the conviction of what he was doing that is affirmed.

As Mr. Gurak admits, there's really no prior record. DP quite a while ago. Ninety days in jail. Mr. Braunskill was admitted on bail pretrial. He should showed up for his trial.

The allegation he would flee after having a few months left to spend in jail at worst has not been substantiated by the State. I remind the Court it's a heavy burden on the State to stop you from enlarging Mr. Braunskill. I maintain they have not met, your Honor. Your opinion was thorough. It was based on ample precedent. It was a narrow issue. Was very likely to be upheld in the Third Circuit on appeal. [Tr. p. 9]

There is no clear evidence of future dangerousness and/or likelihood of flight. He appeared during pretrial and during the trial at all times. Given the fact the burden is a heavy one on the State, I would ask your Honor that the stay be denied.

THE COURT: I'm going to deny the stay. I have not been furnished with any reasons whatsoever as to why this Court should enlarge its order related to Mr. Braunskill.

The State this morning, in response to the Court's questions, cited a lengthy criminal record. As the record clearly reflects, I questioned the Deputy Attorney General concerning this matter and that assertion was just erronous as the Deputy Attorney General now admits.

The Deputy Attorney General further argues that Mr. Braunskill is dangerous. For reasons which were amply set forth by the Court of Appeals very recently in the matter of Carter and Artis versus Rafferty, this is a matter that the State can bring to the attention of the state courts if it cares to. And I need not dwell on that theme, since Judge Garth, speaking for the Court of Appeals, did so.

Originally, as the Court noted, under the prior rule release was mandatory. Now, there are—the rule has been amended and I find no special reason here citing to the rule which would reasonably allow me to conclude that Mr. Braunskill is not going to show up in case my decision is overturned. [Tr. p. 10] Therefore, the relief sought today by the State is denied.

Yes, Mr. Gurak.

MR. GURAK: Your Honor, if I may respectfully ask, with regard to the first part of my presentation, about the interpretation of Carter as to what would constitute a special reason, respondent still submits, your Honor, that likelihood of success on the merits would be cognizable as a special reason. And on that basis, your Honor, I would respectfully request a conditional stay be granted so that we may file our papers by four o'clock tomorrow afternoon in the Third Circuit on this matter.

THE COURT: Wait a second. Today is the 26th of March.

Now, my order, which was issued on the 27th day of February, stated: "Ordered that petition for writ of habeas corpus is hereby granted and further ordered that the

State has a reasonable time in which to retry petitioner that a writ of habeas corpus shall issue unless within 30 days the state of New Jersey shall afford petitioner a new trial."

I'm denying you the relief you seek today for a stay. If you want to go to the Court of Appeals to seek further relief in that regard, that's the State's prerogative.

MR. GURAK: Thank you, your Honor.

THE COURT: You're quite welcome. Good morning.

MR. TURNER: Thank you, your Honor.

Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR PLAINTIFF-RESPONDENT
BY: RAYMOND S. GURAK
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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL NO. 85-2008

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey
Movant-Appellants.

FILED
MAR 26, 1986

CRIMINAL ACTION

ORDER

It is on this 26th day of March, 1986 that movant-appellants' motion for a stay of the Order that a Writ of

Habeas Corpus shall issue, 30 days from February 27, 1986, is denied.

/s/ HAROLD A. ACKERMAN
HAROLD A. ACKERMAN
Hon. Harold A. Ackerman, U.S.D.J.

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANTS
BY: RAYMOND S. GURAK
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

CIVIL NO. 86-5204

DANA BRAUNSKILL,
Petitioner-Appellee,

v.

GARY HILTON, Superintendent, New Jersey State Prison, Trenton, New Jersey and W. CARY EDWARDS, Attorney General of New Jersey,
Movant-Appellants.

CIVIL ACTION
MOTION IN BANC
(for a stay of order)

PLEASE TAKE NOTICE that the undersigned, will move *en banc* on an expedited basis, before the United States Court of Appeals for the Third Circuit for an Order: staying entry of the order of February 27, 1986, that a Writ of Habeas Corpus releasing petitioner shall issue 30

days from that date, pending determination of the direct appeal of this matter by this Court. This motion is not moot since petitioner is otherwise incarcerated for another conviction until May 20, 1986. Reliance will be placed on the accompanying brief and appendix in support of this motion *en banc*.

Respectfully submitted,

W. CARY EDWARDS
ATTORNEY GENERAL OF NEW JERSEY
ATTORNEY FOR MOVANT-APPELLANTS

BY: /s/ RAYMOND S. GURAK
RAYMOND S. GURAK
Deputy Attorney General

DATED: May 16, 1986

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 86-5204

May 16, 1986

DANA BRAUNSKILL
vs.

GARY HILTON, WARDEN AND STATE OF NEW JERSEY
W. CARY EDWARDS, Attorney General of the State of New Jersey, *et al.*,

Appellants

(N.J. D.C. Civil 85-2008)

Present: ALDISERT, *Chief Judge,* SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges.*

1. Appellants' motion in banc for a stay of the District Court's order dated February 27, 1986, pending appeal *and* Brief and Appendix in support of motion, *and* letter dated May 16, 1986, in which it states that appellee is scheduled to be released on parole from state custody on another conviction on the morning of May 20, 1986,

in the above-entitled case(s).

Respectfully,

Deputy Clerk 7-1092

enc.
dt
P.S. Appellants' brief and appendix are due June 21, 1986.
The foregoing Motion is DENIED.

By the Court,

/s/ ALDISERT
ALDISERT
JA 493 Chief Judge

Dated: May 27, 1986
ad/cc: Raymond S. Gurak, Esq.
Jacqueline E. Turner, Esq.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

October 14, 1986

Mr. Allan J. Nodes
Deputy Atty. General
Hughes Justice Complex
Trenton, NJ 08625

Re: Gary Hilton, Superintendent, New Jersey State Prison, et al.,
v. Dana Braunskill
No. 86-108

Dear Mr. Nodes:

The Court today entered the following order in the above entitled case:

The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted.

Very truly yours,

/s/ JOSEPH F. SPANIOL, JR.,
JOSEPH F. SPANIOL, JR., Clerk